85-1647

Supreme Court, U.S.
FILED
APR 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

APRIL TERM, 1986

HOWARD M. RUBINSTEIN
Petitioner

vs.

THE STATE OF TEXAS
Respondent

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEALS

OF THE STATE OF TEXAS,

10TH JUDICIAL DISTRICT AT WACO, TEXAS

HOWARD M. RUBINSTEIN
Pro-Se for Petitioner
1301 Leeland
Houston, Texas 77002
(713) 951-0256

QUESTION PRESENTED

DID THE TRIAL COURT IN THIS DISBARMENT CASE FOLLOW THE QUASI-CRIMINAL GUIDELINES AS REQUIRED BY THIS COURT'S HOLDING IN IN RE RUFFALO THUS AFFORDING THE DEFENDANT HIS RIGHTS OF EFFECTIVE ASSISTANCE OF COUNSEL?

DID THE TRIAL COURT IN THIS CASE GIVE THE PETITIONER SUFFICIENT TIME TO RETAIN AN ATTORNEY AND PREPARE HIS CASE FOR TRIAL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES AND THE HOLDING IN NEUFIELD v. U.S.?[1]

DID THE TRIAL COURT ONCE LEARNING OF DEFENDANT'S INABILITY TO BE PRESENT AND ASSIST IN THIS CASE VIOLATE THE

[1] Neufield v. U.S., 118 F.2d 375 (D.C. Cir. 1973), cert. denied, 315 U. S. 789 (____).

DEFENDANT'S RIGHTS TO CONFRONT HIS ACCUSERS AS GUARANTEED BY THE SIXTH AMENDMENT?

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No. _____

IN THE SUPREME COUNT OF THE UNITED STATES

APRIL TERM, 1986

HOWARD M. RUBINSTEIN

PETITIONER

vs.

THE STATE OF TEXAS

RESPONDENT

PETITION FOR A WRIT OF CERTIORARI

TO THE COURT OF APPEALS

OF THE STATE OF TEXAS,

10TH JUDICIAL DISTRICT

WACO, TEXAS

NOW COMES HOWARD M. RUBINSTEIN, Petitioner, and prays that a Writ of

Certiorari issue to review the Judgment of the Tenth Court of Appeals of the State of Texas entered on this cause on 17 of January 1985 and Motion For Re-Hearing by the Supreme Court of Texas denied on 8 January 1986.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Tenth Supreme Judicial District of Texas at Waco is unreported and appended below as appendix A, Court of Appeals for the Tenth Judicial District of Texas at Waco Docket No. 10-84-06 CV. The Order of the Texas Supreme Court denying the re-hearing is unreported and appended below as Appendix B Texas Supreme Court Docket No. C-4040.

STATEMENT OF JURISDICTION

The Court of Civil Appeals for the Tenth Judicial District entered Judgment on 17 January 1985.

The Texas Supreme Court denied the writ on 11 September 1985 and the Motion for Re-hearing was denied on 8 January 1986. The jurisdiction of this Court is invoked under 28 USC 1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous

> crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the United States Constitution provides as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the United States Constitution provides, in pertinent part, as follows:

". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdictions the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner Howard Rubinstein's personal secretary filed a complaint against Petitioner with a Grievance Committee for the State Bar of Texas in Harris County, Texas in 1980. (Said complaint formed the basis of Appellant's allegations in its formal complaint.)

The Grievance Committee for State Bar District No 4-B, State Bar of Texas, filed its formal complaint in the 164th Judicial District Court on January 2, 1981.

Petitioner filed its answer and Respondent then filed a motion for leave of court to amend its formal complaint, which was granted by the trial court. Respondent amended its formal complaint by adding an additional count being count fifteen which was never acted upon by any of the Grievance Committees involved in these proceedings.

The case on July 18, 1983, was set preferentially for trial for August 18, 1983. But was rescheduled to the 23rd because of a pending on-coming hurricane. Counsel for Petitioner filed a motion to

withdraw as counsel on July 18, 1983, which was overruled on July 18, 1983.

On August 23, 1983, without counsel and being forced to proceed Pro Se, Petitioner filed his motion to withdraw Pro Se. Said motion was overruled on August 23, 1983.

On August 23, 1983, Petitioner also filed, Pro Se, a motion for continuance so that he could appear by counsel of his own selection. Said motion was overruled on August 23, 1983. Also at hearing on August 23, 1983, Petitioner made an oral motion requesting a continuance so that he could have time to find other counsel of his choice and not have to represent himself Pro Se. Said motion was then and there overruled.

The trial commenced on August 23, 1983, without Petitioner's counsel being present. Respondent was present by its counsel. Petitioner was presented Pro Se and a jury was selected.

Petitioner took ill on August 23, 1983, and was admitted to Methodist hospital in the Houston, Texas Medical Center on or about that night. The trial court was informed at 8:35 a.m. the morning of August 24, 1983, that Petitioner had been admitted to the hospital. However, the trial proceeded on August 24, 1983, without Petitioner or his counsel being present. Petitioner filed his motion for continuance based on illness and hospitalization, being supported by the sworn-to affidavit of his doctor, on August 25, 1983. Said motion was overruled not withstanding the

fact that Respondent did not file a controverting affidavit as required by applicable Texas case law.

The trial proceeded until August 26, 1983 without Petitioner or Petitioner's counsel ever being present, at which time the Respondent rested. The jury reached its verdict on August 31, 1983. The trial court rendered a judgment of disbarment on September 9, 1983.

Petitioner filed his motion for new trial on October 6, 1983. Said motion was based on the grounds that: (a) the trial court erred innot granting Petitioner's Motion for Continuance because of illness and hospitalization and that Petitioner was not represented at trial; (b) the trial court erred in not granting Petitioner's Motion for

Continuance because Petitioner was not granted sufficient time to find counsel of his choice who could adequately prepare himself; (c) the judgment was overly harsh; and for other reasons stated therein. The trial court heard and overruled the motion on November 7, 1983. Petitioner took exception to the proceedings of the trial court and to the trial court's judgment by filing notice of appeal on December 5, 1983.

REASONS FOR GRANTING THE WRIT

(1) A trial court which is hearing a disbarment suit in a state court needs to apply the standards of due process as established by the United States Supreme

Court in In Re Ruffalo as compared to the states own guidelines under its rules of civil procedure. Ruffalo established the Quasi Criminal nature of a disbarment suit.

(2) The Sixth Amendment guarantees that a trial court must give the defendant in a Quasi-Criminal proceeding such as a suit for disbarment a reasonable period of time to obtain counsel of his choice.

(3) When the trial court learned of this Petitioner's inability to be in court due to his hospitalization, its duty to inquire about the Petitioner's condition was never fulfilled and Petitioner's rights were further violated by the trial court's conducting the hearing without Petitioner's presence thus denying him his right to confront his accusers as guaranteed by the Six Amendment.

Petitioner has been deprived of his due process rights guaranteed by the Fifth and Fourteenth Amendments of the U.S. Constitution and of his Sixth Amendment right to "assistance of counsel." Although the case law of the State of Texas states that the Rules of Civil Procedure apply in a disbarment proceeding, the United States Supreme Court definitely established the quasi-criminal nature of disbarment proceedings and the consequence for procedural due process in In Re Ruffalo, 390 U.S. 544, 88 S.Ct. 1222 (1968). The Court in In Re Ruffalo, supra, at 550, held that disbarment proceedings of an attorney,

> . . . are adversary proceedings of a quasi-criminal nature . . . and the [defendant] is accordingly

entitled to procedural due process which includes fair notice of the charge.

In view of the fact that the Court has deemed a disbarment proceeding to be of a quasi-criminal nature, it is reasonable to conclude that a defendant therein is entitled to the Sixth Amendment's right to assistance of counsel. See U. S. CONST. Amend. VI. Under this amendment and the due process of law clause of the Fifth Amendment of the United States Constitution, "assistance of counsel" means effective assistance (emphasis added). Neufield v. U. S., 118 F.2d (D.C. Cir. 1973), cert. denied, 315 U. S. 798 (_____). Can the assistance of counsel that Appellant had and/or did not have in the case at bar be viewed as effective in light of our constitutional and case law standards?

Further, a law license has been held to be a valuable property right [the license to practice law is for most attorneys their livelihood, Erdman v. Stevens, supra,[1] therefore the taking of Appellant's law license via disbarment without Appellant being at trial or having assistance of counsel at trial is tantamount to the government taking property from an individual in violation of that individual's rights of due process granted by the Fifth and Fourteenth Amendments of the U.S. Constitution].

The First Circuit has held as early as 1973 that,

[1]Erdman v. Stevens, U.S. 458 F.2d 1205 (2nd Ct. 1972)

> in view of the gravity of the punishment which may be meted out . . . with all of the consequential damages which that entails, the test which must be employed as to the constitutionality of the disciplinary machinery to be used must be a very severe one.

In Re Bithoney, 486 F.2d 319 (1st Cir. 1973). Indeed, that court commented that there should not be any inconsistency between the goal of vigilantly enforcing the disciplinary rules and the goal of providing the "strictest possible due process standards" for the procedures used to carry out necessary bar discipline. In Re Bithoney, supra, at 324.

To summarize the question which this petition presents is whether Texas is correct in applying non-criminal standards to a disbarment case and further did it even pass the mere civil standards without abridging the Fifth, Sixth and Fourteenth Amendments to the Constitution. This Court has already heard these arguments in the cases of (1) In Re Ruffalo and (2) In Re Bithoney.

Further, the trial judge who heard this case paid little or no attention to Petitioner's right to the effective assistance of counsel in preparing his case. Furthermore, the trial court was not asked at trial to inquire about the Petitioner's ability as an attorney to represent himself, but merely asked to determine whether the Petitioner was too ill to attend court

and continue in any capacity as counsel and witness in the case. Courts normally take great pains to allow a key witness to testify yet the trial court did not even try to ascertain the Petitioner's condition as required by law in any case where property will be taken from the Petitioner.

Finally, it appears that the trial court paid little or no attention to the M.D. in the case who filed an affidavit with the court that the Petitioner was hospitalized and unable to attend trial. What justice can be served by denying any person his day in court for reasons he cannot control.

CONCLUSION

WHEREFORE, Petitioner prays that this court grant plenary review, reverse the Texas Court of Appeals for the 10th Judicial District and hold there must be a reversal of judgment or reversal of the trial court with remand to the trial court level in order to protect this Petitioner's rights under the Fifth, Six and Fourteenth Amendments of the Constitution.

Respectfully submitted

HOWARD M. RUBINSTEIN
Pro-Se for Petitioner
1301 Leeland
Houston, Texas 77002

Dated: April 6, 1986

MANDATE

THE STATE OF TEXAS

TO THE 61st JUDICIAL DISTRICT COURT OF HARRIS COUNTY, GREETING:

Before our Court of Appeals on the 17th day of January A.D. 1985, the cause upon appeal to revise or reverse your judgment between

HOWARD RUBINSTEIN, Appellant

Trial Court No. 81-69 and

Court of Appeals No. 10-84-016-CV

THE STATE OF TEXAS, Appellee was determined; and therein our said Court of Appeals made its order in these words:

"This cause came on to be heard on the trascript of the record, and the same being considered, because it is the opinion of this Court that there was no error in the judgment of the court below; it is therefore ordered, adjudged and decreed that the judgment entered on the 9th day of September, 1983 be, and hereby is, affirmed. It is further ordered that Appellant Howard Rubinstein, who has a cash deposit with the District Clerk of Harris County, Texas in lieu of an appeal bond, pay all costs in this behalf expended, and this decision can be certified below for observance."

WHEREFORE WE COMMAND YOU to observe the order of our said Court of Appeals in this behalf, and in all things to have it duly recognized, obeyed and executed.

WITNESS the Hon. FRANK G. McDONALD, Chief Justice of our said Court of Appeals of Texas, with the seal thereof annexed, at the City of Waco, this 29th day of January, A.D. 1986.

ROBERT G. WATTS, CLERK

BY: _____
Deputy

SUPREME COURT OF TEXAS
P.O. Box 12248
Supreme Court Building
Austin, Texas 78711
Mary M. Wakefield, Clerk

January 8, 1986

Mr. Jeffrey L. Greenblum
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Houston, TX 77002

Mr. Howard Rubinstein
1502 Augusta Drive
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Ms. Adele M. Winn
State Bar of Texas General Counsel
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P.O. Box 12487
Austin, Texas 78711

RE: Case No. C-4040

STYLE: HOWARD RUBINSTEIN
v. THE STATE OF TEXAS

Dear Counsel:

Today, the Supreme Court of Texas overruled petitioner's motion

85-1647

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

APRIL TERM, 1986

HOWARD M. RUBINSTEIN
Petitioner

vs.

THE STATE OF TEXAS
Respondent

SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF TEXAS, 10TH JUDICIAL DISTRICT AT WACO, TEXAS

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AFFIRMED
JANUARY 17, 1986

NO. 10-84--016-CV

Trial Court
81-69

IN THE

COURT OF APPEALS

FOR THE

TENTH SUPREME JUDICIAL DISTRICT OF TEXAS

AT WACO

HOWARD RUBINSTEIN,

Appellant

v.

THE STATE OF TEXAS,

Appellee

* * * * * * * * * * * * *

From 61st Judicial District Court
Harris County, Texas
* * * * * * * * * * * * *

This is a disbarment proceeding instituted in the name of the appellee the State of Texas by the Grievance Committee for State Bar District No.

4-B against appellant Howard Rubinstein. Judgment was rendered that appellant be disbarred. This judgment was based on jury findings, involving ten of appellant's clients, that on twenty different occasions appellant signed clients' names to checks payable to them without the clients' authority; committed eleven acts of commingling of his funds with clients' funds; committed eleven acts of misapplication of clients' funds; settled clients' cases without the clients' knowledge nine times; failed to pay the clients' share of settlement on time on eight different occasions; failed to pay to clients the full amount they were entitled from settlements; failed to notify a client of a settlement; and failed to pay off a lien on a client's

car on time. The trial court concluded from these findings that appellant had committed violations of State Bar Disciplinary Rules 1-102(A)(D), 1-102(A)(4), 1-102(A)(5), 1-102(A)(6), 6-101(A)(3), 7-101(A)(1), 7-101(A)(2), 7-101(A)(3), 9-102(A) and 9-102(B) of the Code of Professional Responsibility.

This case began with the filing of appellee's formal complaint on January 2, 1981. Appellant answered with a general denial on February 26, 1981. Appellee's first amended formal complaint was filed on March 10, 1983. On May 23, 1983, the case was set for trial for July 18, 1983. Appellee's second amended formal complaint was filed on June 9, 1983. On the scheduled trial date, July18, 1983, appellant's counsel filed a motion to

withdraw citing irreconcilable differences between counsel and appellant. The motion was denied that day. Counsel also filed a motion for continuance on July 18, 1983, citing defense counsel's trial schedule, defense counsel's discomfort following eye surgery, and the need for more discovery due to the added allegations in appellee's second amended formal complaint. The trial court denied the motion for continuance on that day. Following this denial, appellant discharged his attorney. Although the court had denied the motion for continuance, following appellant's discharge of his attorney the court granted appellant a continuance on July 18, 1983, and reset the trial date for August 18, 1983. At this point in the proceedings, appellant began representing himself.

Appellant filed a motion to file pro se motions, asserting the need to do extensive discovery and pleading before trial. Appellant also sent interrogatories to appellee. A hearing on these matters was held on August 3, 1983, and to the extent that appellant's motion to file pro se motions might interfere with the trial setting for August 18, 1983, the motion was denied. At this hearing appellant made an oral motion seeking a continuance in order that he might "find counsel of his choosing." This motion was also denied. Appellant pro se then filed special exceptions on August 8, 1983. On August 9, appellant filed his first amended plea in abatement and his second amended original answer subject to plea in abatement, both signed by attorney Forest Brazelton. There was no hearing on the

exceptions or the motion to abate, and appellant did not obtain the requested relief. On August 15, 1983, appellant pro se filed in Federal District Court a complaint to enjoin the enforcement of the State Bar Act and filed pro se in the State District Court an application for injunctive relief to stay the trial and enjoin enforcement of the State Bar Act.

The case eventually came on for trial on August 23, 1983. At that time appellant filed a motion to withdraw as attorney pro se. The motion claimed that appellant would not be able to "effectively represent himself due to the inability to be objective in the presentation of his own case" and further asserted that appellant had been unable to prepare for trial because of his "emotional frame of mind." Also on this day, appellant filed another motion for

continuance asserting that two attorneys of his choice, Forest Brazelton and Warren Burnett, had conflicts in their schedules and could not enter the case immediately. Burnett's affidavit was attached to the motion, but there was not one from Brazelton. Both motions were denied on August 23rd.

The case went to trial with appellant representing himself, and a jury was selected. On the following morning, August 24, 1983, appellant failed to appear at the trial. The trial judge stated into the record that a lawyer who disclaimed representation of appellant had called the clerk that morning to say that appellant was in the hospital. The court proceeded with the trial in the absence of appellant. The next day, August 25th, a motion for continuance for appellant signed by attorney James

Patterson was filed with the court. The motion maintained that appellant was "mentally and emotionally unfit to either assist his counsel or act as his own counsel at this time" and that he was "consulting his treating doctor at this time and is under the doctor's care for an undetermined period of time." Attached to the motion was a statement "sworn to and subscribed" by Alan Davis, M.D., before a Notary Public, which stated that appellant was an inpatient at the Methodist Hospital and "due to [appellant's] present medical condition, I request the court to relieve him from any participation in the trial before the court at the present time." The court overruled this motion and proceeded with the trial.

Evidence at the trial shows that on multiple occasions appellant settled

cases without his clients' consent or knowledge, and signed his clients' names without authority on insurance drafts when the checks arrived at his office. These insurance checks, each representing a settlement amount, were then deposited into the law firm's trust account. Then appellant had his secretary make out checks from this trust account to the firm for legal fees and to physicians and others for expenses and to the respective client for his or her portion of the settlement. Instead of quickly providing the clients with their share of the settlement, appellant would sign the client's endorsement without authority on the back of the check and deposit the check into a general purpose account maintained by appellant for his personal use. Appellant used this account to pay his personal bills and used it in a

manner inconsistent with a trust account. At times the balance in this account dropped the amount which represented the clients' interests in the settlements. The evidence showed that many clients received their money several months after settlement checks had been received, signatured and deposited. Appellant used this technique with at least nine clients. Testimony from the clients and from appellant to the Grievance Committee and exhibits such as various insurance drafts, firm checks and deposits slips were used to prove these acts of forgery, commingling and misapplication.

Appellant asserts under his first two points of error that the trial court erred by denying his motion for continuance filed August 25th based on illness, and by denying the motion for continuance filed August 23rd based on

his inability to appear by counsel of his choice. We hold there was no error.

An order granting or denying a motion for continuance will not be disturbed on appeal unless there is a clear showing of abuse of discretion. The matter is to be judged in light of ths facts before the trial court at the time the motion was ruled on. Gulf Ins. Co. v. Dunlop Tire & Rubber Corp., 584 S.W.2d 886 (Tex.Civ.App.--Dallas 1979, writ ref'd n.r.e.).

On July 18, 1983, the day the case was first called for trial, appellant discharged the Honorable Davis Grant, his attorney from the beginning of the case who filed his answer in February, 1981. Although appellant was then granted an additional thirty days by the court in which new counsel could have been obtained, appellant waited until the day

of trial on August 23, 1983, to present his motin asserting that he could not proceed pro se and could not effectively present his case without aid of counsel. His other motion reflected that he had contacted two attorneys "of his choice" during that time period, but it shows that only one of the two was unavailable to aid him in his defense. Moreover, the motion does not explain why appellant was not able to contact more than two attorneys in a thirty-day time period in a city as large as Houston where appellant practiced and where this case was being tried.

Absence of counsel as ground for a continuance requires a showing of diligence in seeking substitute counsel and lack of fault by the complaining party in withdrawal of prior counsel. Strode v. Silverman, 217 S.W.2d 454,

455-6 (Tex.Civ.App.--Waco 1949, writ ref'd); Van Sickle v. Stroud, 467 S.W.2d, 511 (Tex.Civ.App.--Fort Worth 1971, no writ). We fully recognize the valuable right of any litigant to be represented in the trial of his case by counsel of his choice. Nevertheless, our record simply does not show that absence of counsel did not result from want of diligence or fault by appellant. To the contrary, the trial court was entitled to believe under the record that appellant's actions and absence of counsel and the motions were desinged by appellant to avoid trial. We hold there was no abuse of discretion in the denial of the motion for continuance based on lack of counsel.

Similarly, we hold that the trial court did not abuse its discretion in denying appellant's motion for continuance alleging appellant was ill.

The motion alleged that appellant was "mentally and emotionally unfit to either assist his counsel or act as his own counsel at this time"; and that appellant was hospitalized and was being treated by Dr. Davis for an "undetermined period of time." The trial court was not required to grant this motion if it did not set forth sufficient cause supported by affidavit. Rule 251, Vernon's Tex.R.Civ.Proc. It is doubtful that the physician's affidavit, quoted above, even stated that appellant was ill. In any event, it did not state the nature of appellant's illness or how long the illness might last. It did not indicte the severity of the illness or that such illness would prevent attendance at trial or affect appellant's ability to assist his counsel or represent himself as alleged in the

motion. Finally, at the hearing on appellant's motion for new trial, appellant offered no medical testimony to buttress his claim of illness, but only reoffered the affidavit of Dr. Davis.

Appellant argues that since the motion and the affidavit of Dr. Davis were not controverted by appellee the trial court was required to accept them as true. We disagree. The trial court was entitled to examine the motion in light of the record before it. Fritsch v. J. M. English Truck Line, Inc., 151 Tex. 168, 246 S.W.2d 856, 858 (1952). In light of the record and the sketchy allegations and proof in the motion and affidavit we hold that appellant has not shown an abuse of discretion in the denial of the motion based on illness. Insofar as the motion was directed toward appellant's absence as a witness for himself, the

motion did not show the content nor materiality of appellant's testimony and thus did not comply with Rule 252, Vernon's Tex.R.Civ.Proc. Appellant's first two points of error are overruled.

At the trial, certain checks, bank statements, insurance drafts, law firm deposit slips, law firm disbursement sheets, and client employment contracts with appellant were admitted into evidence during and through the testimony of appellant's former secretary, Sheila Jacklyn. Appellant asserts these exhibits had no probative value because they were hearsay, and thus there was no evidence to support the jury findings. Miss Jacklyn testified that her duties as secretary at appellant's law firm included interviewing clients, preparing cases for settlement or trial, answering interrogatories, writing checks from the

law firm's "trust account" and from appellant's general purpose account, and preparation of the firm's disbursement sheets. The evidence admitted through Exhibits 1 through 12, complained against by appellant, consisted of client employment contracts with appellant, checks written from appellant's law firm account and from his general purpose account, deposit slips and law firm disbursement sheets. Miss Jacklyn's testimony showed that she made out the checks and typed the disbursement sheets, that she recognized the signatures on the checks were in appellant's handwriting, and that she was either directly or indirectly involved in the preparation of the other instruments identified by her. Since the existence and identification of this evidence was within the personal knowledge of Miss Jacklyn it was not

hearsay. Appellant futher argues that Miss Jacklyn was not qualified to identify his handwriting or endorsements on the checks as his because she was not an expert in handwriting analysis. However, her testimony established that she had worked for appellant and was familiar with his signature and handwriting. With this knowledge her identification of appellant's endorsements and writings had probative value without need of her qualification as a handwriting expert. We hold exhibits 1 through 12 were properly admitted.

Exhibits 25 and 26, complained against by appellant, consisted of bank statements and checks and deposit slips from appellant's law firm trust account and from his general purpose account. Exhibit 25 showed the deposit of

insurance settlement drafts into the law firm account and Exhibit 26 showed the transfer of the clients' portion of the settlements to appellant's general purpose account. Exhibit 26 also showed that funds were used from the general purpose account to pay some of appellant's personal bills. The exhibits showed further that each of the accounts was overdrawn at times. We believe these exhibits were properly before the jury. In any event, this evidence that insurance settlement drafts were deposited in the law firm account, that the clients' portion of the settlements was transferred to appellant's general purpose account, that funds were used from the general purpose account to pay appellant's personal bills, and that the general purpose account had been overdrawn was merely cumulative of other

evidence introduced at the trial including testimony by Miss Jacklyn, by clients involved and by appellant before the Grievance Committee. Thus, if there was error in the admission of Exhibits 25 and 26 the error was harmless under the whole record and could not have been calculated to cause rendition of an improper judgment.

Appellant's remaining arguments about the admission of evidence complain against exhibits admitted by the trial court under the business records exception of Vernon's Tex.Civ.Stat. art. 3737e. Our review of the record shows that these complaints are wholly without merit, and they are overruled.

Appellant's fourth point of error is based on claimed defects in the court's charge to the jury. We find no merit in these contentions, and they are overruled.

In his final point of error appellant argues that the trial court abused its discretion in assessing the punishment of disbarment. We disagree. Appellant argues that punishment of disbarment was too severe for the act of commingling. However, the record shows multiple acts of commingling and multiple acts of unauthorized settlement of claims, unauthorized endorsement of clients' checks, and misapplication of clients' funds. We find no abuse of discretion.

Appellant's points and contentions are overruled. The judgment is affirmed.

VIC HALL
Associate Justice

ORDERED NOT PUBLISHED
Rule 452, T.R.C.P.

COURT OF APPEALS
TENTH DISTRICT
WACO, TEXAS

I, ROBERT G. WATTS, Clerk of the Court of Appeals for the Tenth District of Texas, at Waco, hereby certify that the foregoing 8 page(s) contain(s) a true and correct copy of the Opinion filed in said Court on the 17th day of January, 1985, in the following numbered and entitled cause, to wit:

HOWARD RUBINSTEIN,

Appellant

NO. 10-84-016-CV

THE STATE OF TEXAS,

Appellee

on appeal to said Court from Harris County, Texas.

GIVEN UNDER MY HAND AND SEAL OF SAID COURT, at office in Waco, this the 10th day of April, 1986.

ROBERT G. WATTS, Clerk

BY: _____

Supreme Court, U.S.
FILED
MAY 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-1647

IN THE
SUPREME COURT OF THE UNITED STATES
APRIL TERM, 1986

HOWARD M. RUBINSTEIN,
PETITIONER

V.

THE STATE BAR OF TEXAS,
RESPONDENT

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF TEXAS

BRIEF FOR RESPONDENT IN OPPOSITION TO WRIT OF CERTIORARI

COUNSEL OF RECORD:

STEVEN D. PETERSON
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STATE BAR OF TEXAS
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ADELE M. WINN
ASSISTANT GENERAL COUNSEL

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No. 85-1647

IN THE
SUPREME COURT OF THE UNITED STATES
APRIL TERM, 1986

HOWARD M. RUBINSTEIN,
PETITIONER

V.

THE STATE BAR OF TEXAS,
RESPONDENT

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF TEXAS

BRIEF FOR RESPONDENT IN OPPOSITION TO WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondent has included this statement because Petitioners' statement is argumentative, conclusory and deficient by omission. Moreover, Petitioner now mentions his version of matters which were not litigated below and are not part of the record.

This case began with proceedings before the State Bar of Texas Grievance Committee No. 4-B. When the Committee

completed its investigation, it authorized the filing of a formal complaint in the district court by the State Bar of Texas which was done on January 2, 1981. After discovery, which included the taking of Petitioner's deposition, the case was set for trial on July 18, 1983. On the date that trial was scheduled, Petitioner's counsel filed a motion for leave to withdraw as counsel citing irreconcilable differences between him and his client. Mr. Rubinstein approved the motion. After the court denied it, Petitioner discharged his attorney.

Petitioner also filed a motion for continuance on July 18, 1983. Various reasons were urged as additional grounds for the continuance. The court denied the motion. Following Petitioner's discharge of his attorney on July 18, 1983, Petitioner was granted a thirty-day extension of time.

Mr. Rubinstein then filed a motion to file motions pro se, alleging the need to do extensive discovery and pleading before trial, and sent interrogatories to the Respondent. The court held a hearing on these matters and various discovery problems on August 3, 1983, at which Petitioner appeared on his own behalf. The court denied Petitioner's motion to file motions pro se to the extent that any motion might or would interfere with the trial setting of August 18, 1983. Petitioner then filed a pleading challenging the sufficiency of Respondent's complaint on August 8, 1983, and an amended plea in abatement on August 9, 1984. Petitioner failed to schedule a hearing on either the special exceptions or the plea in abatement, and Petitioner did not obtain the relief requested.

On August 15, 1983, Petitioner filed an application for injunctive relief to

stay the trial and enjoin enforcement of the State Bar Act. The essence of his argument was that he was denied an administrative hearing on one of the complaints of commingling in violation of his right to due process. Petitioner also filed a complaint to enjoin the enforcement of the State Bar Act in federal district court on August 12, 1983. The courts did not grant the restraining order. On August 15, 1983, Petitioner filed a motion for continuance alleging that he had employed a new attorney approximately two weeks prior to the date of filing the motion. He did not obtain a favorable ruling on this motion.

It is not clear exactly what happened with this "new attorney," but on the day of trial, Mr. Rubinstein filed a motion to withdraw as attorney pro se. The motion alleges that Mr. Rubinstein could not effectively represent himself

due to inability to be objective and to prepare the case due to his "emotional frame of mind." On the same date, Mr. Rubinstein filed another motion for a continuance alleging that the two attorneys of his choice had conflicts in their dockets. The court did not continue the case on the basis of either of these motions.

The court began the trial on August 23, 1983, and the parties selected the jury. On August 24, 1983, Petitioner failed to appear. The court noted that a lawyer who disclaimed representation of the Petitioner called the Clerk to say that Mr. Rubinstein was in the hospital. Judge Tunks told the Clerk to call the lawyer and say that the trial would take place and that he could relay that message to the Petitioner if he wished. The Clerk also delivered this message to a nurse at the hospital.

Mr. Rubinstein's final motion for continuance was filed on August 25, 1983. In it he represented that he was mentally or emotionally unfit to assist his counsel or act as his own counsel and asked for a continuance "until his treating doctors release him and say he is capacitated or in condition to conduct or to assist his counsel in his trial." Attached to the motion is a letter from Jay Alan Davis, M.D. In his letter, Dr. Davis relates that the Petitioner is a patient under his care at the Methodist Hospital. The doctor then states, "Due to his present medical condition, I request the court to relieve him from any participation in the trial before the court at the present time." The letter contains no description of Mr. Rubinstein's condition nor does it state that Petitioner was unable to attend trial. The court overruled the motion

and the State Bar proceeded to trial without the Petitioner.

Mr. Rubinstein made the court's refusal to grant his August 25, 1983, request for continuance a basis for his motion for new trial. At the hearing on the motion he stated that he could not remember how he arrived at the hospital. Mr. Rubinstein did not supply the trial court with any evidence of his condition from a medical professional but made the self-serving statement that he was not allowed to leave the hospital at the time of trial. The court overruled his motion for new trial.

On appeal to the Tenth Court of Appeals and then to the Supreme Court of Texas, Petitioner argued that his motions for continuance should have been granted. He also complained about the admissibility of evidence and about the measure of discipline imposed upon him.

In none of the Texas courts did Mr. Rubinstein do any more to articulate any Constitutional issues regarding the denial of his motions for continuance than he does in his brief in this Court. He simply mentioned the In Re Ruffalo, 390 U.S. 550 (1968) description of attorney disciplinary proceedings as quasi-criminal in nature and argued that application of the Texas Rules of Civil Procedure to his requests for continuance was unfair. The Courts did not address his argument beyond a statement that in Texas, the civil rules govern this question.

The Texas appellate courts upheld the judgment.

STATEMENT OF THE ARGUMENT

Petitioner did not adequately present the Constitutional issues to the state courts. Petitioner's brief is too vague to inform the Court or Respondent of the exact nature of his complaints

about the procedures employed in Texas in attorney discipline cases. The Texas system adequately protects the rights of attorneys who are accused of misconduct and did not deny Petitioner procedural due process. Even in criminal cases, to which Petitioner seeks to compare attorney discipline cases, courts are not required to yield to dilatory tactics of defendants.

ARGUMENT

It is difficult to respond to Petitioner's brief because his statements that he was deprived of procedural due process and of effective assistance of counsel are too general. He fails to identify the particular actions of the courts below which violated his due process rights. He also fails to attach a copy of the opinion by the Texas Court of Appeals. Therefore, pursuant to United

States Sup. Ct. Rule 21.5, this Court should deny his Petition for Certiorari.

Because Mr. Rubinstein was equally vague and deficient in his description of the Constitutional issues to the Texas courts, this Court should find that the state courts were not given a clear opportunity to adjudicate the Constitutional issues which Petitioner now asks this Court to resolve. Therefore, the court should find that it lacks jurisdiction and deny the Petition of Certiorari.

In Texas, attorneys who are accused of misconduct are given notice and opportunity to respond to chages against them by the grievance committees who are investigating the charges. Rules Governing the State Bar of Texas reprinted in 1A Tex.Rev.Civ.Stat.Ann. Title 14 App. art. 10 §10 (Vernon Supp. 1986). Only if the grievance committee finds just cause

to believe that misconduct has occurred is there a lawsuit filed in district court. The district court proceeding is a trial de novo in which the State Bar must prove each allegation to an impartial fact-finder. Defendants are entitled to full discovery privileges and jury trials. They may complain about the sufficiency of pleadings, obtain the names of witnesses and take their depositions. The district court proceedings are governed by the Texas Rules of Civil Procedure.

From the outset of the disciplinary proceedings, Texas attorneys have the right to representation by counsel. Mr. Rubinstein did retain counsel who represented him during the two years the case was pending in the district court. The court observed that Petitioner's counsel was "about as good a counsel as you could have gotten" and that "he knows his stuff

backwards and forwards." Yet, Mr. Rubinstein fired this attorney on the date that the trial was originally scheduled. The court rescheduled the trial so that he had more than a month to retain another lawyer. Petitioner failed to employ new counsel. Clearly, any court would be justified in concluding that Petitioner waived his right to be represented by counsel. This conclusion would be the same whether the proceedings were viewed as civil, quasi-criminal or criminal. Thus, Petitioner is incorrect in arguing that the quasi-criminal nature of the proceedings and the Sixth Amendment would compel a different result. Petitioner's lack of representation at trial was not atrributable to Texas procedures or to any other participant in the trial, but was Petitioner's own fault.

Petitioner also complains that the trial was allowed to continue although he was not present. Again, his complaint is so vague that it is difficult to answer. His reference to the quasi-criminal nature of attorney disciplinary cases conveys the impression that criminal trials cannot take place in the absence of the defendant regardless of the reason for the defendant's absence. Petitioner also conveys the impression that Texas procedural rules permit trials to take place in disciplinary cases although accused attorneys have good reason for being absent. Neither of these impressions is correct.

If Petitioner had been too ill to attend trial as he contended, he would have been entitled to a continuance under the rules which govern Texas civil cases. See Tex. R. Civ. P. 251 and 252. On the other hand, if Petitioner's illness was

not legitimate, the case could have continued even under the rules applicable to criminal cases. See Fed. R. Crim. P. 43; Tex. Code Crim. P. Art. 33.03 (Vernon Supp. 1986).

Of course, Respondent does not acknowledge that attorney disciplinary cases should be treated as criminal proceedings. If they were, the remedies available to the court and the State Bar would be altered as well as he rights of defendants. For instance, courts may require that criminal defendants post bonds to guarantee their appearance and may issue arrest warrants to obtain their presence at trial.

The case of In Re Ruffalo, 390 U.S. 550 (1968) on which Petitioner relies so heavily concerned a situation in which an attorney was disciplined for misconduct but was given no notice of the charge. In that case, the Court observed that

attorney disciplinary proceedings are quasi-criminal in nature. The Court did not elaborate on this statement and also concluded that the lack of notice would have constituted a due process violation in a civil or criminal proceeding.

Even the most expansive interpretation of Ruffalo does not establish that procedures employed in criminal trials be applied to attorney disciplinary proceedings. There is no reason for the Court to hold as much now because attorney disciplinary cases are not penal in nature.

Clearly, the precedential value of Ruffalo lies in the general concept of due process: that attorneys who are accused of misconduct should be given notice of the charges and an opportunity to respond to them at a meaningful time and in a meaningful manner. The Texas system gives attorneys the opportunity to do that twice before discipline is im-

posed. Mr. Rubinstein waived his rights and may not now complain that he was deprived of them.

CONCLUSION

Petitioner's failure to express the points requiring consideration with clarity in this Court justifies denial of his Petition for Certiorari. Petitioner failed to make a sufficient presentation of the Constitutional issues to the Texas courts to warrant consideration by this Court. There is no serious question regarding the constitutionality of Texas procedures in attorney disciplinary cases.

Respectfully submitted,

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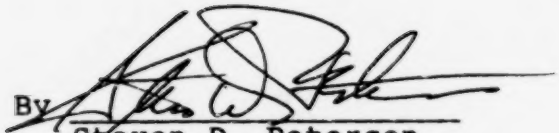
By 
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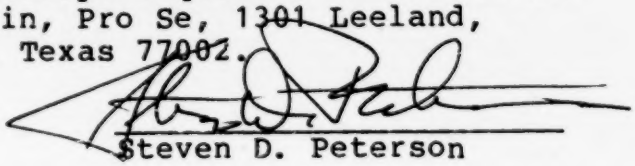
ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

I, Steven D. Peterson, counsel of record for Respondent, State Bar of Texas, do hereby certify that on this the 6th day of MAY, 1986, three (3) copies of the above and foregoing Brief for Respondent In Opposition to Writ of Certiorari was served by certified mail, return receipt requested on Howard M. Rubinstein, Pro Se, 1301 Leeland, Houston, Texas 77002.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